

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6600

[www.montgomerycountymd.gov/content/council/boa/board.asp](http://www.montgomerycountymd.gov/content/council/boa/board.asp)

**Case No. S-2624**

**PETITION OF OMAR AND SONIA HERRAN**

OPINION OF THE BOARD

(Opinion Adopted February 9, 2005)  
(Effective Date of Opinion: March 3, 2005)

Case No. S-2624 is an application special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. The subject property is Lot 6, Block F, Carole Acres Subdivision, located at 501 Fairhill Drive, Silver Spring, Maryland, 20904, in the R-90 Zone.

On December 10, 2004, the Hearing Examiner for Montgomery County held a hearing on the application, and on January 10, 2004, issued a Report and Recommendation for approval of the special exception.

Decision of the Board:                      Special Exception **Granted** Subject  
To Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on February 9, 2005. After careful consideration and review of the record, the Board adopts the Report and Recommendation and grants the special exception subject to the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;

2. The Petitioners will take the following steps to comply with the items set forth in the Memorandum of Therese L. Pelicano, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 12):

- a. Based on the square footage, no more than two unrelated persons, or a family of five may reside in the unit.
- b. The entrance door must have a single-cylinder dead-bolt lock installed. The lock must be key operated from the outside; thumb-turn from the inside.
- c. The gravel car pad in Petitioners' side yard must be surfaced with concrete or asphalt when the spring weather permits that work.<sup>1</sup>

3. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;

4. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and

5. Petitioners must make at least one of the parking spaces on their property available to the accessory apartment tenant.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Donna L. Barron, Wendell M. Holloway and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Allison Ishihara Fultz  
Chair, Montgomery County Board of Appeals

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<sup>1</sup> Housing Code Inspector Robert Dejter agreed to the delay in resurfacing the car pad until the spring.

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 3<sup>rd</sup> day of March, 2005.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**  
**OMAR and SONIA HERRAN**  
Petitioners

Omar Herran  
For the Petition

\*\*\*\*\*

No. S-2624

Rob Dejter

Department of Housing and  
Community Affairs

\*\*\*\*\*

Robert Yeck

With a "Minor" Objection to the Petition

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner

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Board of Appeals Case

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(OZAH Referral No. 05-11)

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**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition No. S-2624, filed on July 6, 2004, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 501 Fairhill Drive, which is Lot 6, Block F of the Carole Acres Subdivision of Silver Spring, Maryland. It is zoned R-90, and the Tax Account Number is 00331697.

On August 16, 2004, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on December 10, 2004, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 11).

The Department of Housing and Community Affairs inspected the property on October 13, 2004, and reported the following issues in a memorandum dated November 29, 2004 (Exhibit 12):

1. The main house measures approximately 1,621 square feet of habitable area. The Accessory apartment is subordinate to the main dwelling[,] measuring approximately 786 square feet of habitable area.
2. Based on the measured habitable area of approximately 786 square feet, the unit may be occupied by no more than 2 unrelated persons or a family not to exceed 5 persons.
3. A single cylinder dead bolt lock (key operated on outside and thumb turn on inside) is required for the apartment entrance door.
4. The side yard being used for parking must have concrete or asphalt surface to prevent erosion.

On December 6, 2004, a letter (Exhibit 13) was received, via FAX, from David Michaels, President of the Greater Colesville Citizens Association (GCCA). His letter, which was received less than 10 days before the noticed hearing date, requested an opportunity for him (or an associate, Robert Yeck) to speak at the hearing on behalf of the GCCA. The letter did not express a position with regard to the petition.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued December 7, 2004, recommended approval of the special exception, with conditions. (Exhibit 14).<sup>2</sup>

A public hearing was convened as scheduled on December 10, 2004, and Petitioner Omar Herran appeared *pro se*. Also attending were Robert DeJter of the Department of Housing and Community Affairs, and Robert Yeck, a neighbor. Testimony was received from all three witnesses, but Mr. Yeck was not permitted to testify on behalf of GCCA because that organization did not comply with the 10 day rule provided in Zoning Ordinance §59-A-4.49.

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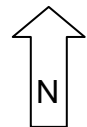
<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

Petitioner executed an affidavit of posting (Exhibit 16), and produced a copy of his deed (Exhibit 15), as well as several photographs (Exhibits 17 (a) and (b)). Petitioner Omar Herran also agreed to meet all the conditions set forth in the Technical Staff Report (Exhibits 14) and in the Housing Code Inspector's Report (Exhibit 12). The record was held open till December 17, 2004, to allow time for the filing of the transcript.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

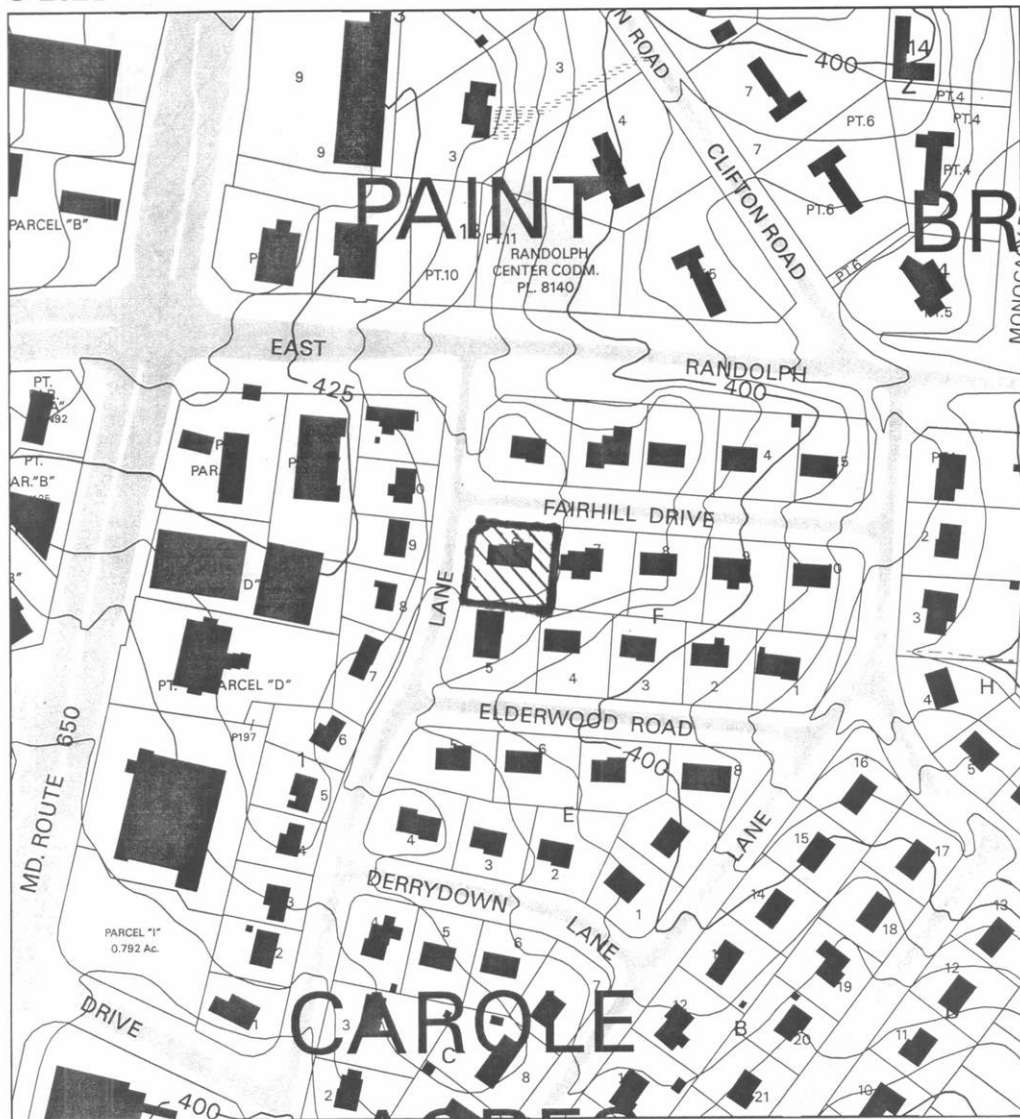
As noted above, the address of the subject property is 501 Fairhill Drive, Silver Spring, Maryland. The subject property has a 14,790 square foot, corner lot, which is designated Lot 6, Block F, in the Carole Acres Subdivision of Silver Spring. It is zoned R-90 (Residential, one-family, detached). The residence in question is located at the southeast intersection of Fairhill Drive and Kara Lane, and according to Technical Staff, the property is relatively flat. The dwelling is set back approximately 30 feet from Fairhill Drive and approximately 30 feet (including the carport) from Kara Lane. A driveway that measures 10 feet in width and 35 feet in depth extends from Fairhill Drive to the carport. The location of the property and its vicinity are shown in the planimetric map attached to the Technical Staff report.



The one and one-half story brick and frame dwelling, with an attached carport, was constructed in 1961 and contains approximately 2,500 square feet of living space, according to

S-2624

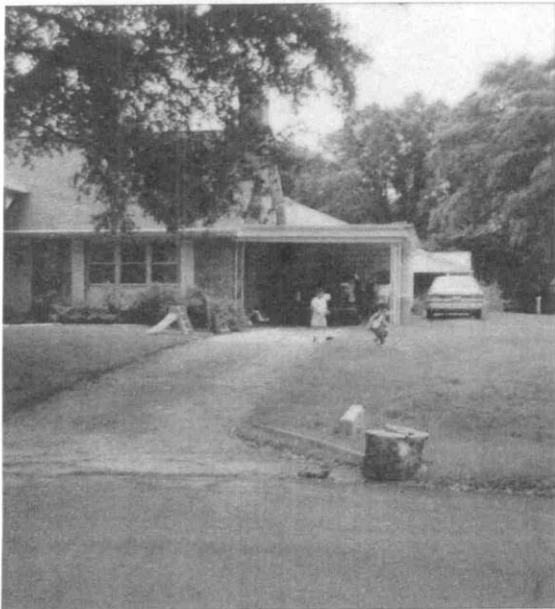
FIGURE 1



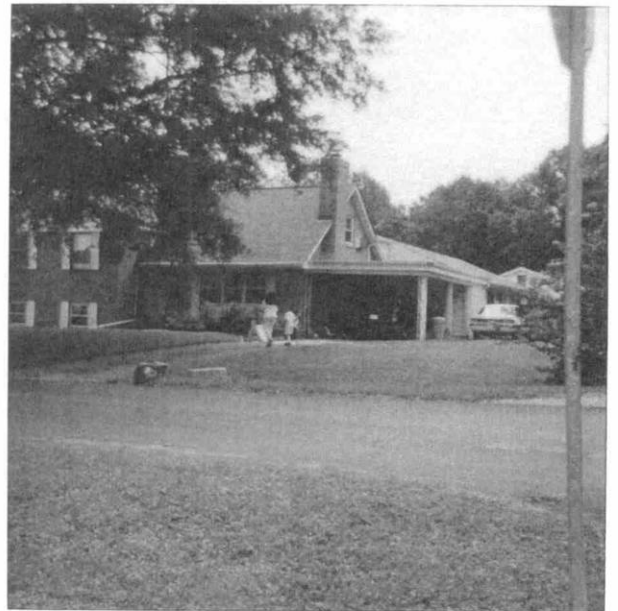
Map compiled on December 08, 2004 at 2:56 PM | Site located on base sheet no - 217NE01

the Technical Staff. The one-story rear addition was added in 2002 (Permit #289479). The dwelling, including the addition, is setback approximately 34 feet from the rear lot line and 15 feet from the side lot line. The lot has a street frontage along Fairhill Drive of approximately 102 feet, and there is a patio located to the rear of the dwelling. The property is shown in the following recent photos (Exhibit 9).

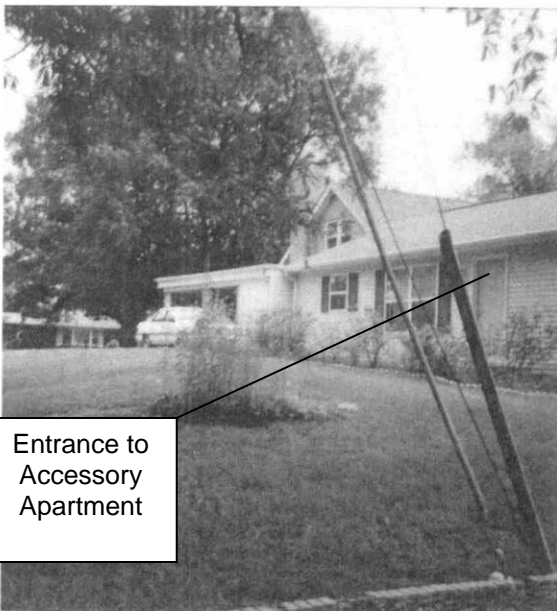




Driveway to Property



Proposed apartment behind car port area



Entrance to  
Accessory  
Apartment

Side view<sup>1</sup> of house  
and proposed apartment



Accessory  
Apartment

Side view<sup>2</sup> of house  
and proposed apartment

Technical Staff notes that, along the walkway entrance to the accessory apartment, is a row of rose bushes and shrubbery. There are three large trees on the lot, and the front of the dwelling includes mature shrubbery and small trees. The general layout of the subject property can be seen on the following copy of the Landscape and Illumination Plan (Exhibit 5).

## B. The Proposed Use

The proposed accessory apartment will be located in the existing one-story

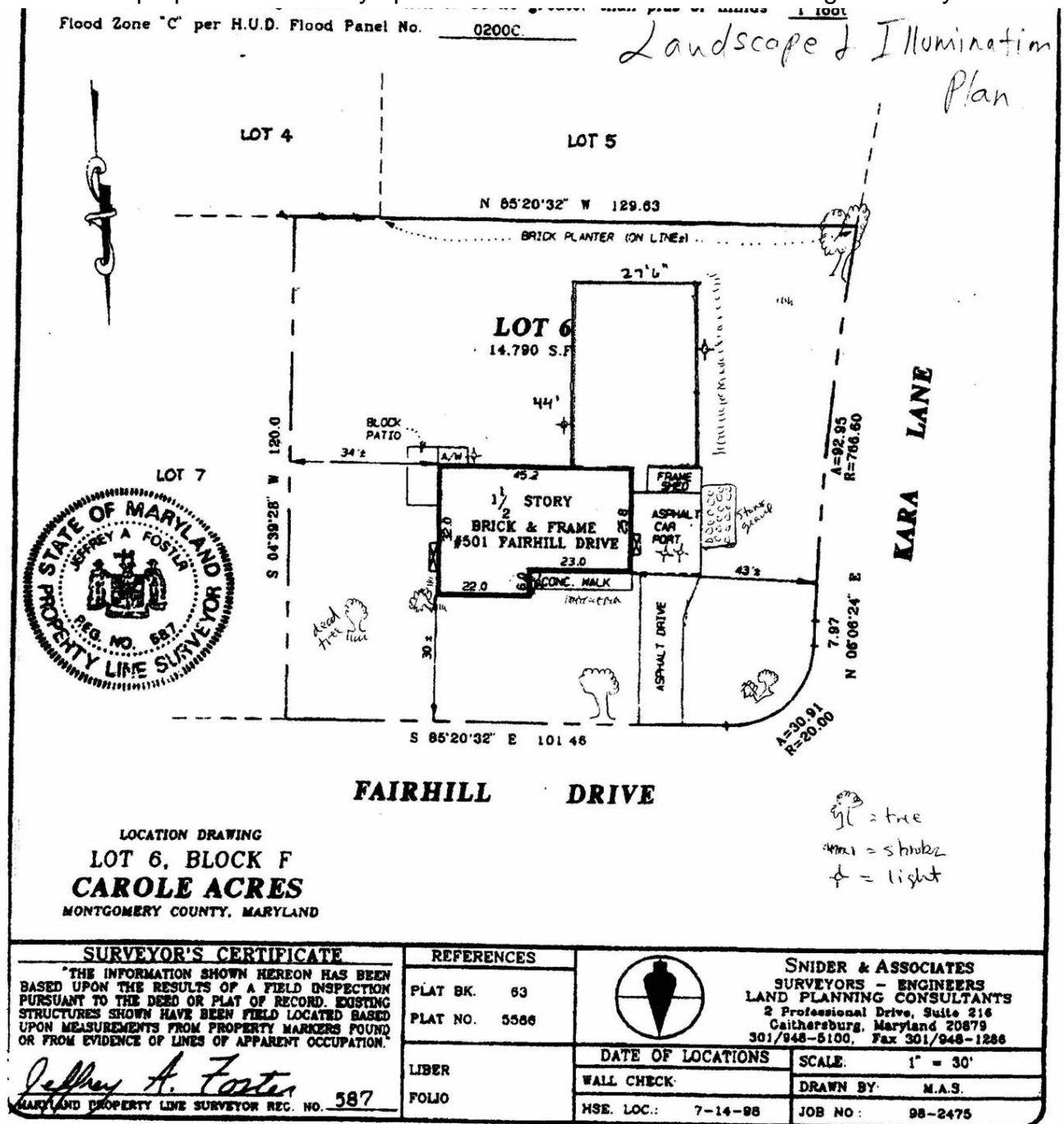
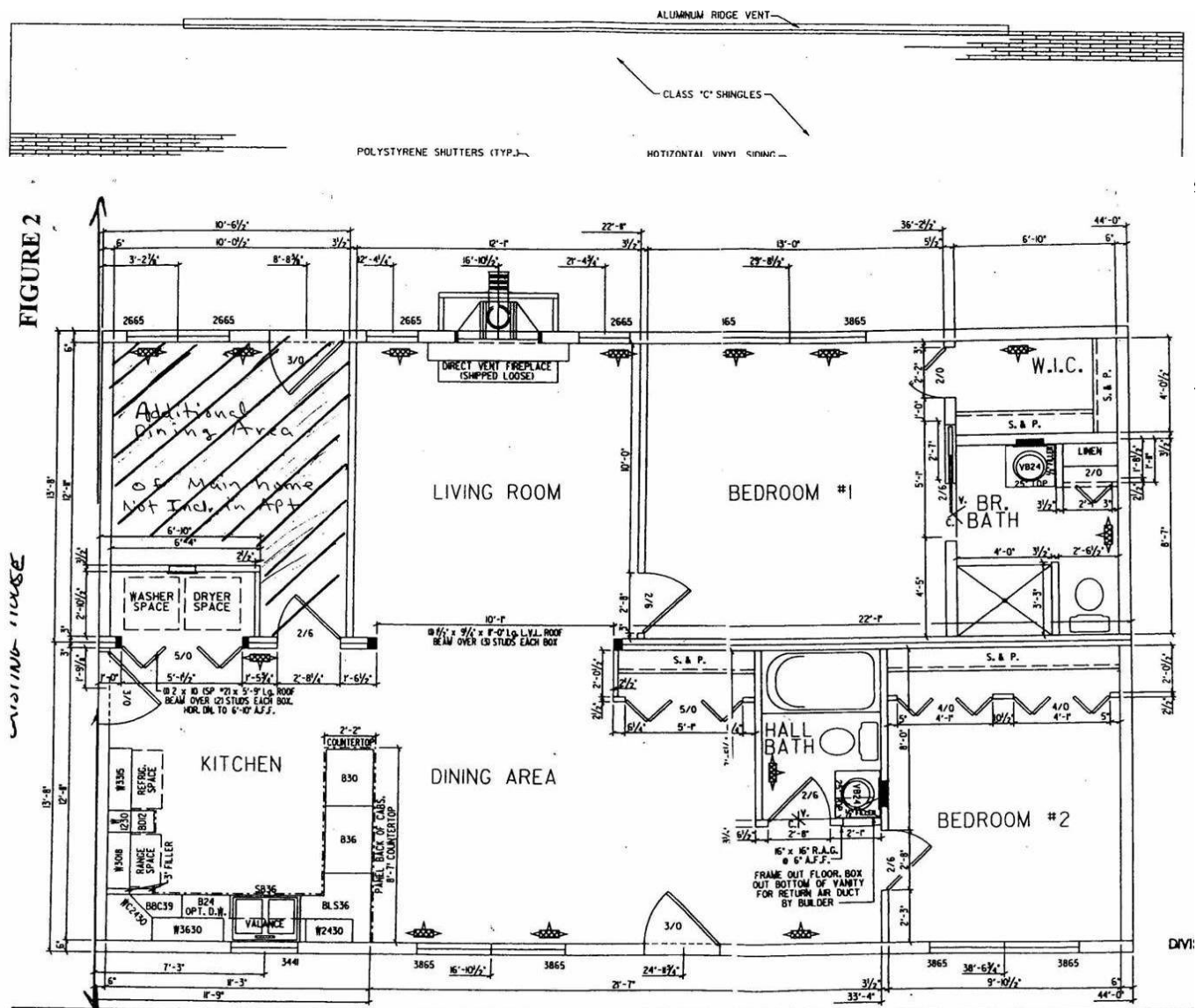


Exhibit No. 5

Technical Staff reports that the proposed apartment is approximately 800 square feet, and there will be rental compensation for only one unit. The primary entrance (stoop and steps) into the apartment faces Kara Lane and is located in a manner that, in the opinion of Technical Staff, maintains the residential character of the neighborhood. An asphalt driveway measuring 10 feet wide and 35 feet deep can accommodate four cars, plus a carport. Additionally, the Petitioners have developed a stone gravel pad adjacent to the carport to accommodate one car.

The Housing Code Inspector calculated the habitable space of the accessory apartment as 786 square feet (Exhibit 12). It includes two bedrooms,



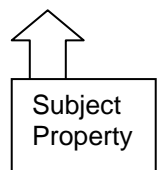
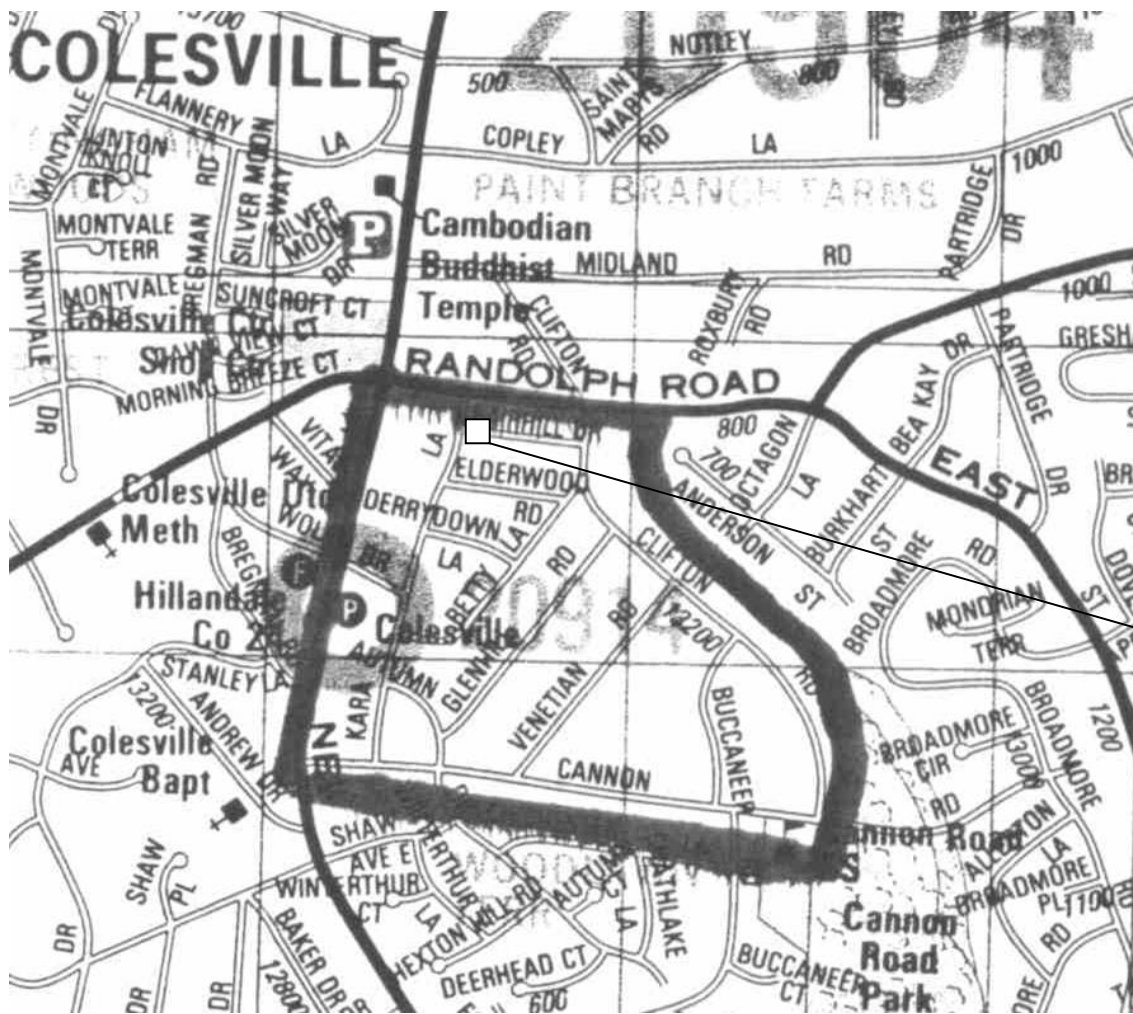
a living room, a bathroom and a combined kitchen/dining area. The floor plan for the accessory apartment, is shown below (Part of Exhibit 6).

The Housing Code Inspector's Report indicates that the accessory apartment may be occupied by no more than two individuals or a family of five, that a single cylinder dead bolt lock must be installed on the apartment entrance door and that the side yard, being used for parking, must have a concrete or asphalt surface to prevent erosion. Petitioners have agreed to comply with the conditions noted by the Housing Code Inspector and Technical Staff, including covering the gravel car pad with asphalt or cement. Tr. 10-15. However, Mr. Herran correctly noted that, with or without the car pad, he has more than sufficient off-street parking (5 spaces) to handle his cars and the expected tenant. Tr. 12. The Hearing Examiner will recommend a condition that one of the spaces be dedicated to the accessory apartment tenant.

### **C. The Neighborhood and its Character**

Technical Staff defined the surrounding neighborhood as the Carole Acres subdivision, which is bordered by East Randolph Road to the north, New Hampshire Avenue to the west, Clifton Road to the east and Cannon Road to the south. The Hearing Examiner accepts that definition, and the neighborhood is depicted below on a portion of the Neighborhood Vicinity Map attached as Figure 4 to the Technical Staff report.

The neighborhood land is zoned R-90 for single-family dwellings, and according to Technical Staff, is fully developed with detached single-family residences. Single-family detached homes extend to the east on Fairhill Drive on



both sides of the street. Single-family detached residences are also present on both sides of Kara Lane. The majority of the residences have driveways and attached garages/carports. Technical Staff reports that there are no accessory apartments in the general area.

#### **D. Neighborhood Opposition**

The only opposition to the instant petition is the testimony of Robert Yeck, who characterized his own objection as “minor.” Tr. 50. Mr. Yeck lives at 14301 Northwyn Drive, Silver Spring, almost two miles north of the subject site and outside of the defined neighborhood. He appeared at the hearing to testify on behalf of GCCA, but was not permitted to because that organization did not comply with the 10 day rule specified in Zoning Ordinance §59-A-4.49. Tr. 6-7.

Mr. Yeck was permitted to testify on his own behalf, and he did so, stating his concerns “about apartments moving into single family areas.” Tr. 40. He feared that they would generate excessive trash. Tr. 43. His concern was alleviated by Mr. Herran’s assurance that the accessory apartment tenant’s trash would be picked up by his own trash collection service. Tr. 43. Moreover, according to Technical Staff, there are no other accessory apartments in the defined neighborhood. Mr. Yeck thought there might be some “unregistered accessory apartments,” but he understood that Department of Permitting Services could take enforcement action. Tr. 44.

Mr. Yeck also raised concerns about the possible generation of traffic (Tr. 40) and parking (Tr. 41) in a busy area. However, Technical Staff opined that “the subject use will have no adverse effect on the area roadway system or pedestrian facilities, and satisfies the requirements of Local Area Transportation Review . . .” There is no evidence in the record to contradict this conclusion, and the Hearing Examiner therefore so finds. Moreover, the undisputed evidence establishes that Petitioners have ample off-street parking (6 spaces, including driveway, carport and car pad) to meet the statutory requirement of two off-street spaces for an accessory apartment. Zoning Ordinance §59-G-2.00(c)(3). There is even additional available on-street parking. Tr. 46.

The Hearing Examiner has no basis for concluding that granting a special exception in this case will change the character of neighborhood. Mr. Yeck conceded that the subject structure was compatible with the neighborhood. Tr. 41. The accessory apartment will be located in the existing addition of an existing dwelling and will not require any exterior construction; there is more than sufficient parking; traffic conditions will not be affected adversely; there is no excess of similar uses in the defined neighborhood, and special exceptions for accessory apartments are expressly permitted by the Zoning Code for the R-90 Zone. Therefore, Technical Staff opined that “the use will be in harmony with the general character of the surrounding residential neighborhood.” The Hearing Examiner has no evidentiary basis to find to the contrary. Under Maryland law, probative evidence, such as that provided by Technical Staff in their report, cannot be outweighed by contentions that amount to little more than generalized concerns and unsupported allegations. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93, 262 A.2d 499, 504-505 (1970); *Moseman v. County Council of Prince George’s County*, 99 Md. App. 258, 265, 636 A.2d 499 (Ct. Spec. App. 1994).

### **E. The Master Plan**

Petitioners' property is subject to the 1997 *White Oak Master Plan*. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. In discussing Special Exceptions (page 24), the Plan's stated objective is to "Evaluate new requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed." Because Petitioners plan no external structural modifications to the subject property, and their proposed use will not generate excessive traffic, parking, glare or other adverse effects, the requested special exception will maintain the residential character of the area.

The Master Plan notes that the White Oak Master Plan area "offers a variety of housing," and seeks to "continue to provide a variety of housing types." Page 18. On the same page, the Plan recommends encouraging the development of "a variety of housing types for all income ranges." The Hearing Examiner takes official notice of a recent study by the M-NCPPC noting that:

[accessory apartments] can be an excellent solution to the shortage of affordable housing by producing extra income for homeowners, dispersing the supply of moderate-cost housing more uniformly throughout the community, contributing to the tax base, reducing sprawl by providing more concentrated urban housing opportunities, and providing a means for extended family members to live together in a single site. *Housing Montgomery: A Menu of Options for a Dramatic Increase in the Supply of Housing for our Workforce*, 3/6/03, Montgomery County Planning Board Agenda Item #1

Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the goals and objectives of the *White Oak Master Plan*.

### **III. SUMMARY OF HEARING**

At the hearing, testimony was heard from Petitioner, Omar Herran, from Housing Code Inspector, Robert Dejter, and from a neighbor, Robert Yeck.

#### Petitioner, Omar Herran:

Petitioner Omar Herran executed an affidavit of posting (Exhibit 16), and submitted a copy of Petitioners' deed (Exhibit 15). He adopted the findings and conclusions of the Technical Staff Report (Exhibits 14) and also agreed to meet all the conditions set forth therein and in the Housing Code Inspector's Report (Exhibit 12). Tr. 8-12. Mr. Herran wanted to postpone resurfacing his side-yard gravel car pad until the spring (to which the Housing Code Inspector had no objection). Tr. 13-15. However, Mr. Herran correctly noted that, with or without the car pad, he has more than sufficient off-street parking (5 spaces) to handle his cars and the expected tenant. Tr. 12.

In questioning by the Hearing Examiner, Mr. Herran identified the photos of his

home which are contained in Exhibits 9 and 17. He also testified as to his compliance with each of the general and specific standards for obtaining an accessory apartment special exception. Tr. 25- 34. Specifically, there would be only one accessory apartment; the apartment has at least one party wall in common with the main dwelling; the addition where the accessory apartment would be located is already in place; the house was built in 1961; there is no family of unrelated persons on the premises; there are no rental uses on the premises other than the subject accessory apartment; there is a separate entrance for the accessory apartment that preserves the appearance of a single family home; there are no modifications planned to the external part of the house; the accessory apartment would have the same street address as the main dwelling; the accessory apartment has under 1200 square feet of floor space and is subordinate to the main dwelling; the owners would occupy the main dwelling; Petitioners have owned the property for five and a half years (*i.e.*, more than a year has elapsed since the owner purchased the property); compensation will be received by Petitioners for only one dwelling unit; the lot is approximately 14,790 square feet (which exceeds the 6,000 square foot minimum lot size); there are no other special exceptions in the area; there is off-street parking for five cars; there would be no adverse effects on the neighbors from the accessory apartment; the accessory apartment use is consistent with the applicable Master Plan; the accessory apartment will be in harmony with the general character of neighborhood; the accessory apartment would not be detrimental to the use, peaceful enjoyment, value or development of the surrounding properties, and in fact would add value; there would be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity; the accessory apartment will meet the development standards of the zone; the accessory apartment would not alter the residential nature of the area, nor would it adversely affect the health, safety, security, morals or general welfare of the residents, visitors or workers in the area; it would be served by adequate public facilities; and would not reduce the safety of vehicular or pedestrian traffic.

Mr. Herran further testified that the apartment's tenant "would have to be consistent with our own values, as this person that would ultimately live in the proposed apartment would be my closest neighbor, and so, based on that, I can assure the community that individual or individuals living in that location would be of no negative impact." Tr. 34. In answer to a cross-examination question by Mr. Yeck, Mr. Herran testified that trash for the tenant would be picked up in front of his house and would not be a problem. Tr. 36.

Housing Code Inspector Robert Dejter:

Housing Code Inspector Robert Dejter testified by reading the Housing Code Inspector's report (Exhibit 12) which had been prepared by Inspector Therese Pelicano. Tr. 36-37. He also indicated that he had no problem with delaying resurfacing of the side-yard gravel car pad until the spring. His concern was erosion if it were left with only a gravel cover. Tr. 13-15. He further testified that Petitioners' accessory apartment has about 786 square feet of habitable space. Tr. 28. He also stated that there were no other accessory apartment special exceptions in the neighborhood. Tr. 30.

Robert Yeck:

The only opposition to the instant petition is the testimony of Robert Yeck, who characterized his own objection as "minor." Tr. 50. Mr. Yeck lives at 14301 Northwyn Drive, Silver Spring (Tr. 5), almost two miles north of the subject site and outside of the defined neighborhood. He appeared at the hearing to testify on

behalf of GCCA, but was not permitted to because that organization did not comply with the 10 day rule specified in Zoning Ordinance §59-A-4.49. Tr. 6-7.

Mr. Yeck was permitted to testify on his own behalf, and he did so, stating his concerns “about apartments moving into single family areas.” Tr. 40. He feared that they would generate excessive trash. Tr. 43. His concern was alleviated by Mr. Herran’s assurance that the accessory apartment tenant’s trash would be picked up by his own trash collection service. Tr. 43. Mr. Yeck thought there were some “unregistered accessory apartments” in the area, but he understood that Department of Permitting Services could take enforcement action. Tr. 44.

Mr. Yeck also raised concerns about the possible generation of traffic (Tr. 40) and parking (Tr. 41) in a busy area. Mr. Yeck conceded that the subject structure was compatible with the neighborhood. Tr. 41.

The record was held open for a week after the hearing to allow time for filing of the transcript.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibits 14).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish



what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments:

the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including potential for additional noise from that additional household.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two. That is the case here. There are no unusual characteristics of the site.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

### **B. General Conditions**

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector’s report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is governed by the 1997 White Oak Master Plan. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. In discussing Special Exceptions (page 24), the Plan's stated objective is to "Evaluate new requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed." Because Petitioners plan no external structural modifications to the subject property, and their proposed use will not generate excessive traffic, parking, glare or other adverse effects, the requested special exception will maintain the residential character of the area.

The Master Plan notes that the White Oak Master Plan area "offers a variety of housing," and seeks to "continue to provide a variety of housing types." Page 18. On the same page, the Plan recommends encouraging the development of "a variety of housing types for all income ranges." Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the goals and objectives of the White Oak Master Plan. Technical Staff reached the same conclusion.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Technical Staff noted that “the accessory apartment will be located in an existing addition of the dwelling and will not require construction of an addition to provide additional floor space. There is more than sufficient parking: four spaces on the driveway, a carport and on-street parking in front of the house. Traffic conditions will not be affected adversely. Staff does not find an excess of similar uses in the defined neighborhood, since there are no other existing special exception uses.” Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees because this single-family neighborhood can easily and harmoniously accommodate the activity associated with this special exception. Petitioner Omar Herran also testified that the accessory apartment would not adversely affect the neighborhood. The only evidence in the record to raise a question about this issue is Mr. Yeck’s “minor” testimonial opposition, which is outweighed by the other testimony and the Technical Staff report in this case. Therefore, the Hearing Examiner finds that the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Petitioner Omar Herran testified that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. A light is located at the front porch, at a height of about six feet, and a light hangs over the entrance to the apartment and over the rear entrance of the dwelling that faces the rear patio. Technical Staff found (Exhibit 14, p. 4) that the “major doorways and pathways to the subject site are well lighted, but not to an obtrusive degree.” Thus, the undisputed testimony supports the conclusion that the accessory apartment will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There are no other accessory apartments in the neighborhood according to the Housing Code Inspector’s testimony, and there are no special exceptions of any kind in the area, according to Technical Staff. Therefore, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review ("LATR").<sup>3</sup> The Technical Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. See the July 2004 LATR Guidelines, of which the Hearing Examiner takes official notice. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the LATR.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

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<sup>3</sup> The Policy Area Transportation Review (PATR) was abolished as of July 1, 2004, pursuant to the FY 2003-5 Annual Growth Policy(AGP) – Policy Element.

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use will "not have an adverse effect on pedestrian access or safety" and "will not have an adverse effect on the transportation network," the Hearing Examiner so finds.

### **C. Specific Standards**

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

#### **Sec. 59-G-2.00. Accessory apartment.**

*A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:*

##### **(a) Dwelling unit requirements:**

- (1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in an attached addition to the house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All*

*development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed.

The accessory apartment will be located in an existing addition.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The original house was built in 1961. It therefore meets the “5 year old” requirement.

- (5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through an existing door on the front of the addition (west side of the house). There will be no change to the residential appearance of the dwelling.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications are proposed.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment is clearly subordinate to the main dwelling, as it occupies approximately 800 square feet (786 of

which is habitable space) in an addition to Petitioners' home, which has approximately 2,500 square feet of floor space (Exhibit 3).

**59-G § 2.00(b) Ownership Requirements**

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioners live in the main dwelling and plan to continue living there.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioners acquired the property in 1998 according to the deed (Exhibit 15), more than one year before the filing of the petition in 2004.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioners will receive compensation for only one dwelling unit.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioners are the owners of the property.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable



**59-G § 2.00(c) Land Use Requirements**

*(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject lot is approximately 14,790 square feet in size. The following chart from the Technical Staff Report (Exhibit 14) demonstrates compliance with all development standards:

<i>Development Standard</i>	<i>Required</i>	<i>Provided</i>
Minimum Lot Area (square feet)	9,000	14,790
Minimum lot width (feet) at front building line for 1-family detached dwelling	75	101.46
Minimum street setback (feet)	30	30
Minimum Setback from adjoining lot (feet)		
--One side	8	15
--Sum of both sides	25	49
--Rear	25	34

*(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: There are no other accessory apartments in the neighborhood. Thus, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses.

*(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

*Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: There are at least four off-street parking spaces in Petitioners' driveway, one space in their carport and one more space on their gravel car pad. The Hearing Examiner concludes that ample parking is available to accommodate the proposed use, according to all the evidence.

#### **D. Additional Applicable Standards**

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 12) notes certain issues, and has recommended that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of five. As noted above, Petitioners have agreed to meet all conditions.

## **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2624 for a special exception for an accessory apartment located at 501 Fairhill Drive, Silver Spring, Maryland, be GRANTED, with the following conditions:

6. The Petitioners are bound by their testimony, representations and exhibits of record;

7. The Petitioners will take the following steps to comply with the items set forth in the Memorandum of Therese L. Pelicano, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 12):

a. Based on the square footage, no more than two unrelated persons, or a family of five may reside in the unit.

b. The entrance door must have a single-cylinder dead-bolt lock installed. The lock must be key operated from the outside; thumb-turn from the inside.

c. The gravel car pad in Petitioners' side yard must be surfaced with concrete or asphalt when the spring weather permits that work.<sup>4</sup>

8. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;

9. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and

10. Petitioners must make at least one of the parking spaces on their property available to the accessory apartment tenant.

Dated: January 10, 2005

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner

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<sup>4</sup> Housing Code Inspector Robert Dejter agreed to the delay in resurfacing the car pad until the spring.